

4/28/93

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
  
BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Kaw Valley, Inc.,	)	IF&R Docket No. VII-1076C-91P
	)	
Respondent	)	

Federal Insecticide, Fungicide, and Rodenticide Act -- Evidence -- Documents signed by Respondent's president during Agency inspection of Respondent's facility stating that pesticide was "released for shipment" were not conclusive admissions by Respondent on that point, but could be disputed by Respondent; therefore Respondent's affidavits challenging the documents in this proceeding created a "genuine issue of material fact" that requires denial of Complainant's motion for partial accelerated decision for Respondent's mislabeling of a pesticide allegedly "released for shipment."

ORDER DENYING MOTION FOR PARTIAL ACCELERATED DECISION

This Order denies a motion for partial accelerated decision filed by the Complainant in this proceeding--the Director, Air and Toxics Division, Region VII, U.S. Environmental Protection Agency (hereinafter "Complainant")--against the Respondent--Kaw Valley, Inc. (hereinafter "Respondent"). Complainant began this proceeding by issuing a December 13, 1990 complaint under the authority of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. §§ 136-136y (hereinafter "the Act").

The complaint, based on a February 22, 1989 Agency inspection of Respondent's facility in Leavensworth, Kansas, charged Respondent with holding for sale a pesticide that lacked the proper labeling. Complainant's motion requested a decision declaring Respondent to have violated the Act as charged. The motion cited three documents signed by Respondent's president during the inspection stating that the pesticide was "packaged, labeled, and released for shipment;"<sup>1</sup> and the motion then pointed to the allegedly inadequate labeling on the pesticide. Respondent's basic defense, supported by affidavits, was that this pesticide was not in fact being held for sale, i.e., that it was not yet "released

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<sup>1</sup> Memorandum in Support of Complainant's Motion for Partial Accelerated Decision (October 9, 1991) at 1, 5, 6.

for shipment."<sup>2</sup>

### Complainant's Motion

To succeed, Complainant's motion for partial accelerated decision must establish, in the words of Section 22.20(a) of the Agency's Consolidated Rules of Practice (40 C.F.R. § 22.20(a)), that "no genuine issue of material fact exists." The one possible issue posited by Respondent is whether the pesticide was being held for sale, i.e., "released for shipment." Complainant's evidence here was, as noted, three documents signed by Respondent's president during the February 22, 1989 inspection by the Agency.

Each document was a one page form or statement prepared by the Agency. The first was a Notice of Inspection form, on which the Agency's inspector had checked an entry stating that the purpose of the inspection was for "inspecting and obtaining samples of any pesticides ... packaged, labeled, and released for shipment."<sup>3</sup> The second document was a Receipt for Samples form stating that the relevant samples were "from pesticides ... packaged, labeled, and released for shipment."<sup>4</sup> Third was a several-paragraph handwritten statement in which one sentence declared that the inspector "sampled the products we had in stock which were packaged, labeled and released for shipment."<sup>5</sup>

### Respondent's Reply

Respondent's reply consisted of three affidavits. One, executed by Respondent's president, said that the pesticide "was in the warehouse ...[and] not released for shipment" at the time of the inspection, and that it "contained a label titled, 'Quarantine - hold for Q.C. Release.'"<sup>6</sup> These statements were supported by an affidavit signed by Respondent's plant manager.<sup>7</sup>

The affidavit of Respondent's president stated further that labels had been ordered for the pesticide on February 18, 1989,

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<sup>2</sup> Respondent's Reply to Claimant's Motion for Partial Accelerated Decision (October 21, 1991).

<sup>3</sup> Memorandum, supra note 1, at 5, Exhibit 1(b).

<sup>4</sup> Id. 6-7, Exhibit 1(c).

<sup>5</sup> Id. 6, Exhibit 1(d).

<sup>6</sup> Respondent's Reply, supra note 2, at 3-4, Exhibit C.

<sup>7</sup> Id. 3-4, Exhibit B.

four days before the Agency's inspection;<sup>8</sup> and this statement was corroborated by the third affidavit, signed by the president of a printing company.<sup>9</sup> As argued by Respondent, "if in fact the pesticide was released for shipment at the time of the inspection, the Respondent would not have had need for the new labels ... [and] the 'QUARANTINE' label would not have been placed on the shipment to prevent the workers in the warehouse from getting mixed up."<sup>10</sup>

The affidavit of Respondent's president addressed also his signature on the three documents cited by Complainant. He said that he had signed the forms titled Notice of Inspection and Receipt of Samples to indicate his agreement that an inspection was being held and that the pesticides listed thereon were available to be sampled.

As to the several-paragraph statement, which was an account of the inspection, the affidavit of Respondent's president said that it had been handwritten by the inspector. The president's affidavit said further that he had signed it as "basically an agreement with the general nature of the statement and not the specific language that the pesticide was released for shipment."<sup>11</sup> As argued by Respondent, "[t]he first two (2) admissions were boilerplate language contained in forms ... [and] [t]he third alleged statement was merely the inspector putting words on paper for the Respondent to sign off on."<sup>12</sup>

#### Discussion

Certainly Respondent's three affidavits are sufficient to show that a "genuine issue of fact exists" as to whether the pesticide was released for shipment, except for one point: are the three documents signed by Respondent's president conclusively binding admissions that the pesticide was so released? On this question, the law is clear. These admissions by Respondent's president were, like admissions generally, not conclusive against Respondent, but were simply pieces of evidence to be weighed along with all the other evidence.<sup>13</sup>

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<sup>8</sup> Id. 3-4, Exhibit C.

<sup>9</sup> Id. 3-4, Exhibit A.

<sup>10</sup> Id. 3-4.

<sup>11</sup> Id. Exhibit C.

<sup>12</sup> Id.

<sup>13</sup> In the Matter of U.S. Aluminum, Inc. at 3-7, Docket No. EPCRA-89-0124, Ruling on Motion for Partial Accelerated Decision (November 26, 1991) at 3-7; In the Matter of Pitt-Des Moines, Inc.,

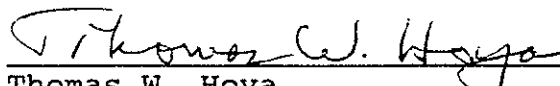
As ordinary items of evidence, these admissions by Respondent's president may be challenged by Respondent to lessen their weight, as Respondent has sought to do here. These admissions are to be distinguished from a special type of admission, viz., a judicial admission, which is an admission made during the proceeding itself, such as in a pleading filed in that proceeding. A judicial admission is normally conclusive against the party making it.

Respondent's admissions, however, were not made during this proceeding, but were just ordinary admissions made before the proceeding began. Thus Respondent is not bound by them; they are simply to be considered alongside Respondent's affidavits disputing them. Whether the force of these affidavits is enough on the merits to overcome the admissions remains to be seen. All that is important for the moment is that the affidavits are clearly enough to create a "genuine issue of material fact" as to whether the pesticide was released for shipment. Consequently, the affidavits require that Complainant's motion for partial accelerated decision be denied.

For a final resolution of this case, one possibility is that the parties may now be able to negotiate a settlement. The instant Order clarifies the procedural posture of the case, and it would be useful for the parties at this point to explore any chances for settlement. The parties are commended for the openmindedness toward settlement that they evinced during the telephone conference of March 11, 1993. Accordingly, they will be directed to try to negotiate a settlement, and Complainant will be directed to report on the status of the negotiations.

Order

Complainant's motion for partial accelerated decision is denied. The parties are directed to try to negotiate a settlement, and Complainant is directed to report by June 15, 1993 on the status of the negotiations.

  
Thomas W. Hoya  
Administrative Law Judge

Dated: April 28, 1993

IN THE MATTER OF KAW VALLEY, INC., Respondent,  
Docket No. IF&R-VII-1076C-91P

Certificate of Service

I certify that the foregoing **Order Denying Motion For Partial Accelerated Decision**, dated April 28, 1993, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Venessa R. Cobbs  
Regional Hearing Clerk  
U. S. Environmental Protection  
Agency  
726 Minnesota Avenue  
Kansas City, KS 66101

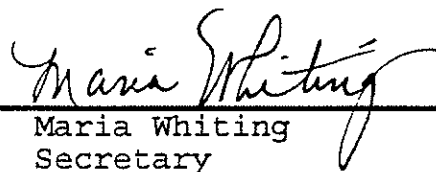
Copy by Regular Mail to:

Attorney for Complainant:

Kent Johnson, Esquire  
Assistant Regional Counsel  
U.S. Environmental Protection  
Agency  
726 Minnesota Avenue  
Kansas City, KS 66101

Attorney for Respondent:

Gary Nelson, Esquire  
John C. Tilloston, Esquire  
Murray, Tilloston & Van Parys  
606 Delaware  
P.O. Box 10  
Leavenworth, KS 66048

  
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Maria Whiting  
Secretary

Dated: April 28, 1993